DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
9200 Corporate Boulevard
Rockville MD 20850

August 17, 1999

Mr. Jeffrey N. Gibbs, Esq.
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700 Thirteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

Re Docket Number 91N-0281

Dear Mr. Gibbs:

This letter is in response to your petition (Docket Number 91N-0281) filed with the Dockets Management Branch, Food and Drug Administration (FDA) dated November 12, 1998 and supplemented on December 14, 1998. Your petition requested that the FDA either withdraw the proposed rule published in the Federal Register of January 8, 1993 (58 FR 3436) requiring the submission of a premarket approval application (PMA) or a notice of completion of a product development protocol (PDP) for the silicone inflatable breast prosthesis (the saline-filled breast implant) or reopen the comment period to allow interested persons to address information that has become available since publication of the proposed rule. On May 3, 1999, FDA sent the final rule to the Office of Management and Budget (OMB) for review under Executive Order 12866. OMB has reviewed and cleared the rule under the Executive Order and FDA expects to publish it soon.

FDA is denying your petition for the reasons discussed below.

Many preamendments devices, including saline-filled breast implants, were placed into class III due to an absence of safety and effectiveness information at the time of their classification. Section 515(b)(2)(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360e(b)(2)(a)) (the act) specifies the procedure for promulgating a regulation to require the submission of PMAs for a class III preamendments device. The process begins with the publication in the Federal Register of a proposed rule calling for the submission of a PMA or a PDP. In the Federal Register of January 6, 1989 (54 FR 550), FDA published a list of 31 preamendments class III devices, including saline-filled breast implants, that the agency identified as having a high priority for initiating 515(b) rulemaking. In the Federal Register of January 8, 1993 (58 FR 3436), FDA published a proposed rule under section 515(b) of the act for the saline-filled breast implant.

The Agency has followed the procedures described in the act with regard to the classification and proposal to call for PMAs for the saline-filled breast implant. These

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procedures included providing an opportunity for the submission of comments on the proposed regulation and findings and providing an opportunity to request a change in the classification of the device. The comment period initially closed on March 6, 1993 but was extended until April 8, 1993 to ensure adequate time for preparation and submission of comments on the proposed rule. The agency's action to complete this call for PMAs is consistent with the intent of Congress and is in accordance with the procedures contained in the statute and the regulations.

1. **Must FDA reopen the comment period and/or withdraw the proposed rule in order to provide interested persons an adequate opportunity to comment?**

In your petition, you assert that, in order to comply with the rulemaking provisions of the Administrative Procedures Act (APA) (5 U.S.C.553(c)), FDA must reopen the comment period or withdraw the proposed rule requiring the submission of a PMA or PDP for the saline-filled breast implant in order to provide an opportunity for interested persons to comment on new studies that have emerged over the last six years on the safety of this device. You stated that this new information demonstrates the safety of the saline-filled breast implant.

FDA welcomes the submission of new information, the development of which was, in part, stimulated by publication of the proposed rule. In fact, FDA intentionally delayed finalizing the proposed rule in order to allow manufacturers more time to collect safety and effectiveness data on their saline-filled breast implants to be submitted in a PMA or PDP. The agency hopes that manufacturers will continue to collect new data up to the time of submission of their PMA's or PDP's.

The Agency believes that a determination of safety and effectiveness can be made only on the basis of data submitted in a PMA or PDP for a specific saline-filled breast implant. As you know, we have been forthright in our communication with all manufacturers regarding the timeframe for finalizing the proposed rule and the type of data necessary to support a PMA or PDP.

The agency is not ignoring the new studies mentioned in your petition. Indeed, FDA has taken these studies into consideration in developing the final rule. You assert that the data presented by these new studies demonstrate the safety of the saline-filled breast implant. The issue presented by the rule, however, is not whether the saline-filled breast implant is safe for its intended use, but rather what degree of regulatory control is needed to provide reasonable assurance of its safety and effectiveness. FDA does not believe that class I general controls or class II special controls would provide reasonable assurance of the safety and effectiveness of the saline-filled breast prosthesis. FDA, therefore, believes that premarket approval is still necessary to provide such assurance.

Interested persons were provided an opportunity to participate in the rulemaking process in accordance with section 553(c) of the APA. The agency does not believe that the new studies mentioned in your request warrant reopening the comment period. The information you refer to is not of a different nature than the information that existed at the time the proposed rule was issued. Consequently, the public was not deprived of the right to comment on the call for submission of PMA's.

FDA's failure to reopen the comment period to provide an opportunity for interested persons to address the studies that have been published regarding this device is not inconsistent with FDA's action regarding other devices, as you assert. The infant radiant warmer and the penile rigidity implant, which are the examples you have cited, are situations in which the new information that came to FDA's attention supported the reclassification of the devices. For saline-filled implants, however, FDA has not yet seen information that it believes would support the reclassification of the device. If you believe that sufficient new information exists to demonstrate that class I or class II controls will provide reasonable assurance of the safety and effectiveness of saline-filled breast prostheses, you should submit that information in the form of a reclassification petition in accordance with the regulations in Title 21 of the Code of Federal Regulations, Part 860, Subpart C. Absent a reclassification petition, FDA believes that there is no reason to withdraw the proposed rule or reopen the comment period.

**2. Is FDA's proposed rule arbitrary and capricious because it is not supported by substantial evidence?**

You state that the proposed rule is arbitrary and capricious because it was not supported by substantial evidence. FDA recognizes that there were, and still are, weaknesses associated with the saline-filled breast implant literature. However, this lack of information further supports FDA's conclusion that, at the time of the proposed rule in 1993, there were not adequate data to determine that general controls would provide reasonable assurance of the safety and effectiveness of the device or to establish special controls to provide this assurance. Furthermore, FDA still believes that the potential risks identified in the proposed rule exist and need to be addressed in a PMA or PDP. Throughout the process, the Agency has used, and continues to use, the best science available to address the regulation of these devices. The agency's actions have been based on the science, not on media coverage of this issue. FDA believes that it is in the best interest of the public health to finalize the proposed rule and to have the safety and effectiveness of each saline-filled breast implant assessed in a PMA or PDP.

You also assert that, in the proposed rule, FDA does not clearly differentiate between the saline-filled breast implant and the silicone gel-filled breast implant. The background to the 1993 proposed rule for the saline-filled breast implant clearly stated that where there was no documentation specific to the saline-filled breast implant, it was appropriate to consider documented risks associated with materials which may be used in the device, or risks

associated with another similar device. However, comparison of risk information between devices should not be confused with an equation of risk.

**3. Does the rule comply with the Paperwork Reduction Act?**

Your petition also states that the proposed rule for the silicone inflatable breast prosthesis did not address the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). You specifically state that FDA must comply with these requirements as well as the new requirements of the Paperwork Reduction Act of 1995 (Pub. L.104-13).

The information collection requirement entitled "Premarket Approval of Medical Devices" has been previously approved by the Office of Management and Budget (OMB) under OMB Control Number 0910-0231. On January 27, 1999, FDA published a notice in the Federal Register announcing that it had submitted this information collection now named "Premarket Approval of Medical Devices – 21 CFR Part 814 and FDAMA Sections 201, 202, 205, 207, 208, 209," to OMB for review and clearance of an extension of the approval under the Paperwork Reduction Act of 1995. OMB recently cleared this extension under OMB Control No. 0910-0231. FDA will announce this clearance in the Federal Register soon. This information collection covers all premarket approval applications for medical devices including those required for the saline-filled breast implant. Therefore, FDA has complied fully with the Paperwork Reduction Act of 1995.

**4. Has FDA complied with the Regulatory Flexibility Act?**

Your petition states that the agency did not comply with the certification requirements of the Regulatory Flexibility Act (Pub. L. 96-354) and did not make available in the Dockets Management Branch a copy of the economic impact analysis as stated in the preamble to the proposed rule.

FDA examined the impacts of the January 1993 proposal in accordance with the criteria under Executive Order 12291 and the Regulatory Flexibility Act, as it existed at that time. On September 30, 1993, President Clinton issued Executive Order 12866, which revoked Executive Order 12291 and replaced it with new requirements for cost-benefits analysis and centralized review and clearance of regulations by OMB. The Regulatory Flexibility Act was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121).

On January 6, 1989 (54 FR 550), FDA issued a notice of intent to initiate proceedings to establish the effective dates of the requirement for premarket approval for 31 class III preamendments devices. Included among the 31 devices was the saline-filled breast implant. At that time, FDA made available at the Dockets Management Branch an

economic impact analysis of the proposed action (Docket No. 88N-0244).

During the comment period on the proposed rule of January 8, 1993 to require premarket approval for saline-filled breast prostheses, FDA did not receive any comments addressing the Regulatory Flexibility Act analysis or the economic impact analysis under Executive Order 12291 (or the lack thereof).

In the final rule, FDA has addressed Executive Order 12866 and the Regulatory Flexibility Act and has made the appropriate certifications.

**5. Do omissions from the administrative record necessitate reopening the comment period?**

Your petition states that the administrative record for this rulemaking lacks certain information. In particular, you state that an economic impact statement is not in the docket as stated in the January 1993 proposed rule and that some of the references cited in the proposal are missing certain pages.

FDA has reviewed the administrative record of the proposed rule. As noted above, the economic impact analysis was made available previously in Docket No. 88N-0244. Although it was not included in the administrative record of the proposed rule, the agency believes that there was adequate opportunity to comment on the economic analysis. As also noted above, until FDA received your petition, we received no comments or complaints about the economic analysis or the failure to place it in the administrative record.

Although some pages were missing from the administrative record for 3 of the 51 references, FDA does not believe that this is grounds for withdrawing the proposal or reopening the comment period. First, the omissions were very few in light of the large number of references. Second, the referenced material was from published literature and, therefore, was readily available from other sources. Finally, you have not demonstrated that your ability to submit meaningful comments on the proposal was in any way compromised by the missing pages. FDA has added the economic impact analysis and the missing pages to the administrative record for this rule.

Your petition also objects that FDA included in the administrative record only a list of the adverse experience reports that FDA received concerning saline filled breast implants. Your petition suggested that detailed information on each report is necessary for meaningful comment.

The nature of the adverse experience reports for saline filled breast implants is well known and the type of adverse event was indicated for each report. Therefore, we do not believe that it is necessary that the full reports be placed on the record in order to provide an adequate opportunity to comment.

**Conclusion**

Women's health issues, including the safety and effectiveness of the saline-filled breast implant, are of great concern to the FDA. Women who are considering being implanted with these devices want very much to be informed of the risks and benefits of these devices. The requirement for data to be submitted in a PMA or PDP application will be an important step in providing adequate answers to many of their questions. Despite the existence of new information in the literature, FDA continues to believe that the safety and effectiveness of these devices can be assured only if manufacturers submit PMA's or PDP's for their devices. Although FDA is denying your petition, we are prepared to work with you and others to provide for safe and effective saline-filled breast implants and to address issues related to these devices and to assure timely review of all submissions for these products. If you have any questions on the information described above, please contact Joseph M. Sheehan at 301-827-2974.

Sincerely yours,

Linda S. Kahan

Linda S. Kahan
Deputy Director for Regulations and Policy
Center for Devices and Radiological Health